STATE OF MICHIGAN
IN THE 19TH JUDICIAL CIRCUIT
BENZIE COUNTY

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiff,

Civil Action Number 08-8279-CE

v.

Honorable David A. Thompson

Graceland Fruit, Incorporated, and
Kevin Bonney d/b/a
Bonney Brothers Pumping Company,

Defendants.

AGREEMENT OF FORMAL DISPUTE

Plaintiff, Michigan Department of Environmental Quality (DEQ), and Graceland Fruit, Incorporated, and Kevin Bonney d/b/a Bonney Brothers Pumping Company (Defendants) have agreed to settle a dispute initiated by Defendants pursuant to Section XIII of the Consent Judgment filed on July 17, 2008 regarding assessed monetary penalties by the DEQ against the Defendants for obligations arising under the Consent Judgment.

STATEMENT OF FACTS

The Defendants were required to restore the impacted stream to background physical, chemical, and biological conditions within 5 (five) years from the effective date of the Consent Judgment, or by July 17, 2013, as required under Section VI, 6.1. The Defendants' consultant, Fishbeck, Thompson, Carr & Huber, Incorporated (Consultant), submitted a report in September, 2008 that proposed how this requirement would be met. The DEQ reviewed this report and determined that this approach would not result in meeting the requirement to return the stream to background levels by July, 2013 and

under the terms of the Consent Judgment required that the Defendants submit a remedial action work plan within 30 days.

The Defendants disputed the need for a work plan and initiated the dispute resolution process set forth under Section XIII of the Consent Judgment. The parties entered an agreement resolving this dispute on April 29, 2010. Through this agreement the Defendants agreed to submit an Interim Response (IR) Contingency Plan by May 25, 2010. This agreement established some alternate deadlines requiring that the Defendants meet certain performance objectives and other requirements under Section VI of the Consent Judgment; however, the requirement to achieve background conditions in the stream by July 17, 2013 was not extended. The agreement also identified an air sparge treatment system as a proposed form of active remediation. The agreement further required that the IR Contingency Plan include a schedule for a final design of the active treatment system.

The Defendants' Consultant subsequently proposed installing an air sparge system in correspondence dated May 25, 2010 and again on July 30, 2010. The DEQ approved this proposed active remediation by letter dated August 2, 2010 with a final design due by September 1, 2010. The Defendants' requested an extension to this deadline. The DEQ granted an additional 18 (eighteen) months to install the air sparge system.

The Defendants did not meet this deadline. On November 22, 2013, the DEQ filed a Motion to Enforce Consent Judgment Dated July, 2008. Through this action, the DEQ sought a final design and installation of the air sparge system. The DEQ also pursued stipulated monetary penalties. The parties settled that motion without a hearing, other than the issue of stipulated damages.

STIPULATION AND RESOLUTION

The DEQ and Defendants agreed to settle this disputed matter as described in the Final Agency Decision in Formal Dispute Resolution issued by the DEQ on June 24, 2016 (attached as exhibit 1). As the issues in dispute have been resolved to

the satisfaction of the DEQ, the parties hereby accept the following terms of this settlement agreement as final resolution of the matters in dispute as set forth therein.

1. The DEQ agrees that the Defendants have submitted the final design for the air sparge system and that the air sparge system was installed in October 2014.
2. The Defendants agree to pay a stipulated monetary penalty as provided under Section XI, 11.3 of the Consent Judgment in the amount of $60,000 and that upon payment the disputed matters described in the Formal Dispute Resolution and Motion to Enforce Consent Judgment dated July, 2008 are fully resolved.
3. Each Defendant agrees to make 50% of the payments in accordance with the following schedule:
    a. The first payment of $10,000 shall be due not later than 30 days from the effective date of this agreement.
    b. Payment in the amount of $10,000 shall be due quarterly (every 3 months) thereafter by the end of the month for each quarter.
    c. The final payment of $10,000 shall be made not later than the end of the 18th month from the effective date of this agreement.
4. The DEQ will provide an invoice to the defendants detailing the payment amount and due date for each payment. All funds due pursuant to this Consent Order shall be by check made payable to the State of Michigan and delivered to the Accounting Services Division, Cashier's Office for DEQ, P.O. Box 30657, Lansing, Michigan 48909-8157, or hand delivered to the Accounting Services Division, Cashier's Office for the DEQ, 425 West Ottawa Street, Lansing, Michigan 48933. To ensure proper credit, all payments made pursuant to this Consent Order must include the **Payment Identification No. WRD-40127**.
5. Execution of this Agreement resolves all pending penalty obligations asserted against Defendants in the above referenced matter.
6. This agreement is effective when signed by the DEQ, WRD Chief.

The signatories hereto are fully authorized representatives of each party and agree to be bound by the terms and conditions of this agreement.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

Kimberly Fish, Acting Chief
Water Resources Division

Date: Aug 24, 2016

GRACELAND FRUIT, INCORPORATED

Troy N. Terwilliger on behalf of Graceland Fruit, Incorporated

Date: August 1, 2016

BONNEY BROTHERS PUMPING COMPANY

Kevin Bonney on behalf of Bonney Brothers Pumping Company

Date: Aug 11th 2016

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

RICK SNYDER
GOVERNOR

KEITH CREAGH
DIRECTOR

June 24, 2016

CERTIFIED MAIL 7009 2820 0001 9804 3797

Mr. Joseph E. Quandt, Esquire
Kuhn Rogers PLC
412 South Union Street
Traverse City, Michigan 49684

CERTIFIED MAIL 7009 2820 0001 9804 3803

Mr. Matthew D. Zimmerman, Esquire
Varnum LLP
Bridgewater Place
333 Bridge Street NW
P.O. Box 352
Grand Rapids, Michigan 49501-0352

Dear Mr. Quandt and Mr. Zimmerman:

SUBJECT: Department of Environmental Quality v Graceland Fruit Inc. and Kevin Bonney d/b/a Bonney Bros. Pumping Company
Benzie County Circuit Court No. 08-8279-CE
Consent Judgment (CJ)
Final Agency Decision in Formal Dispute Resolution

The Department of Environmental Quality (DEQ), Water Resources Division (WRD), has completed its review and analysis of the factual circumstances surrounding the assessment of stipulated monetary penalties against Graceland Fruit, Inc. and Kevin Bonney d/b/a Bonney Bros. Pumping Company (collectively, the Defendants) in accordance with Section 13.4 of the Consent Judgment (CJ) (Exhibit A). The decision was based upon a review of the facts and discussions on the matter between the parties in the formal meeting held on June 24, 2016, and the documents submitted by Mr. Joseph E. Quandt on behalf of Bonney Bros. Pumping Company dated April 15, 2016. The review also included documents contained in the WRD's facility file relevant to this matter.

It is my determination, as the final agency arbiter being so authorized under the CJ, that the Defendants have failed to meet certain requirements of the CJ for submitting a final system design by the deadline under Section VI 6.4 and the Agreement of Dispute Resolution (Agreement) entered April 29, 2010 (Exhibit B). The Defendants also failed to install an active remediation system by the deadline established in the Agreement and subsequent documents being an Air Sparge system, designed to restore background stream conditions required under Section VI, 6.1 of the CJ and paragraph 1.e of the Agreement.

Factual Overview:

An Air Sparge treatment system was proposed by Fishbeck, Thompson, Carr and Huber, Inc. (consultants) on behalf of Graceland Fruit, Inc. in an Interim Response Work Plan dated May 25, 2010 (Exhibit C), and more specifically defined in a follow-up letter from the consultants dated July 30, 2010 (Exhibit D). This corrective action proposed for remediating the impacted stream was approved by the DEQ by letter dated August 2, 2010 (Exhibit E). The Air Sparge system final design was then due not later than 30 days after this letter being September 1, 2010, but was not submitted by this deadline. Over three months later, the Defendants contacted the DEQ claiming that they did not have the financial resources to submit a design plan or install the Air Sparge system until sometime in the future (Exhibit F). A meeting was held on April 2, 2011, between the Defendants and the DEQ. At that meeting, the DEQ informed the Defendants that they needed to begin installation of the Air Sparge system without further delay as the Defendants' failed to meet their obligations under the CJ and the Agreement for submitting a final design plan. The Defendants requested an extension to the deadline for installing the Air Sparge system during that meeting.

Following a comprehensive financial review of the Defendants' businesses at their request, the DEQ completed a comprehensive analysis for each Defendant (Exhibit G[1]), based upon this review, DEQ granted the Defendants' request and authorized an additional 18 months (until January 22, 2013) to install the Air Sparge system (Exhibit H). However, even after this lengthy extension, the Defendants failed to install the system by the extended deadline of January 22, 2013. The DEQ then notified the Defendants by letter dated February 5, 2013, that they had failed to install the system as required under the CJ and again requested submission of the final system design (Exhibit I). The Defendants' acknowledged this fact and requested an additional extension with a new deadline of November 30, 2013, to install the system asserting that by this new deadline the Defendants' will provide additional information to the DEQ and allow it to determine if an Air Sparge system is necessary (Exhibit J).

The DEQ then filed a Motion to Enforce the Defendants' obligations under the CJ in the Benzie County Circuit on November 11, 2013, and sought stipulated penalties for violating several mandates under the CJ (Exhibit K). In accordance with Section IX, 11.3 of the CJ, for each failure to comply with the provisions of Sections V and VI of the CJ, the Defendants' shall pay stipulated penalties of $500 per violation for the first 7 days, $750 per violation per day for days 8 through 14, and $100 per violation per day thereafter (Section 11.3).

The Defendants were notified by letter dated April 2, 2014, from the Department of Attorney General (DAG) that stipulated penalties in the amount of $94,600 had accrued as of March 22, 2014, and would be held in abeyance to allow further settlement negotiations (Exhibit L).

[1] Only the cover page of the financial review reports for each Defendant is provided due to the length of the documents and the confidential nature.

The Defendants did not provide a final system design until May 23, 2014, and the Air Sparge system was not installed and operational until mid-November, 15, 2014. By letter from the DAG dated February 23, 2015, the Defendants were notified that the stipulated penalties accrued as of that date totaled $107,500 and payment was demanded therein (Exhibit M).

The Defendants' repeated failure to meet the various obligations under the CJ, even after being granted lengthy extensions, is unacceptable and disregards the applicable mandates of the CJ, and the requirements of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451 (MCL 324.3101 *et seq.).*

Determination:

Although the Defendants have proffered numerous reasons for the repeated delays and missed deadlines set forth in the CJ, the initial Dispute Resolution Agreement and the extensions allowed by the DEQ over the past approximately six years, the DEQ has concluded that much of these delays were avoidable or otherwise attributable to the Defendants actions, noting that some may have been attributable to their financial circumstances.

It is the decision of the DEQ that stipulated penalties are necessary in this matter, that the Defendants' reasons for not meeting their obligations under the CJ are largely unacceptable given the circumstances, and that the amount of the stipulated penalty demanded of $107,500 is factually justifiable and necessary. However, upon completing a full review of the circumstances and accepting that the issues in dispute have been addressed, the DEQ agrees to settle the issues in this dispute for $60,000. The DEQ believes that this amount is fair, appropriate, and serves to protect the State's interest in this matter. The payment of this stipulated penalty may consist of a structured payment agreement that must be completed and that is acceptable to the DEQ not later than July 29, 2016.

Sincerely,

Peter Ostlund, Acting Chief
Water Resources Division

Enclosures
cc: Mr. Charles Cavanagh, DAG
Mr. Barry Selden, DEQ
Mr. Eric Chatterson, DEQ